XIII. ADMINISTRATION OF SUPPORT MECHANISMS

A. Overview

772. Consistent with the Joint Board's recommendation, we conclude that all telecommunications carriers that provide interstate telecommunications services and certain other providers of interstate telecommunications must contribute to universal service support. As we determine what funds are needed to support all of Congress's universal service goals, we must also determine the amount of contribution to be assessed and collected from each carrier. We adopt the Joint Board's recommendation that a carrier's contribution to support for eligible schools, libraries, and health care providers be assessed based on contributors' interstate and intrastate telecommunications revenues. We modify slightly, however, the Joint Board's recommendation by assessing contributions on the basis of end-user telecommunications revenues.[1974] Because the Joint Board did not recommend an interstate and intrastate assessment base for high cost and low-income programs, for now we will assess the support for these programs solely from contributors' interstate end-user telecommunications revenues.

773. The Joint Board made no recommendations as to how carriers may recover universal service contributions. We determine today that we will permit recovery of universal service contributions through the contributing carrier's interstate rates. For ILECs subject to our price cap rules, we will permit ILECs to treat their contributions for the new universal service support mechanisms as an exogenous cost change.[1975]

774. We adopt the Joint Board's recommendation that the administrator of the universal service support mechanisms should exempt from contribution and reporting requirements those carriers for which the cost of collection exceeds the amount of the contribution. We also agree with the Joint Board that we should appoint an independent, neutral third party as the permanent administrator of the support mechanisms, following a recommendation by a Federal Advisory Committee.

B. Mandatory Contributors to the Support Mechanisms

1. Background

775. Section 254(d) mandates that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory

[1974] We note that State Commissioners McClure and Schoenfelder disagreed with the Joint Board's recommendation to assess contributions for the programs for eligible schools, libraries, and rural health care providers on interstate and intrastate telecommunications revenues. The vote on this issue was 6-2.

[1975] *See Access Charge Reform Order* at section VI.D.2.b.

basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[1976] The statute defines the term "telecommunications carrier" as "any provider of telecommunications services,"[1977] and the term "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[1978] In addition, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[1979] In the NPRM, the Commission sought comments discussing which service providers would fall within the scope of the term "telecommunications carrier" and, among those, which would be required to contribute to the federal support mechanisms.[1980]

776. In the Recommended Decision, the Joint Board recommended that the Commission require any entity that provides interstate telecommunications for a fee to the public or to such classes of users as to be effectively available to the public to contribute to the support mechanism.[1981] The Joint Board recommended that information and enhanced service providers not be required to contribute to the support mechanism.[1982] Finally, the Joint Board stated that section 332(c)(3)[1983] does not preclude a state from requiring all CMRS providers operating within its borders to contribute to state support mechanisms.[1984]

2. Discussion

[1976] 47 U.S.C. § 254(d).

[1977] The Act specifically exempts aggregators of telecommunications services (as defined in section 226) from the definition of "telecommunications carrier." 47 U.S.C. § 153(44).

[1978] 47 U.S.C. § 153(46).

[1979] 47 U.S.C. § 153(43).

[1980] NPRM at para. 119.

[1981] Recommended Decision, 12 FCC Rcd at 481.

[1982] Recommended Decision, 12 FCC Rcd at 483.

[1983] Section 332(c)(3) states that "[n]othing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates." 47 U.S.C. § 332(c)(3).

[1984] Recommended Decision, 12 FCC Rcd at 484.

a. Criteria for Mandatory Contributions

777. We agree with the Joint Board's recommendation that all telecommunications carriers that provide interstate telecommunications services must contribute to the support mechanisms.[1985] To be considered a mandatory contributor to universal service under section 254(d): (1) a telecommunications carrier must offer "interstate" "telecommunications"; (2) those interstate telecommunications must be offered "for a fee"; and (3) those interstate telecommunications must be offered "directly to the public, or to such classes of users as to be effectively available to the public."[1986]

778. Interstate. Telecommunications are "interstate" when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia.[1987] In addition, under the Commission's rules, if over ten percent of the traffic carried over a private or WATS line is interstate, then the revenues and costs generated by the entire line are classified as interstate.[1988] In response to CNMI's comments that territories and possessions should be included within the definition of "interstate,"[1989] we agree with the Joint Board's conclusion that interstate telecommunications services include telecommunications services among U.S. territories and possessions because such areas are expressly included within the definition of "interstate."[1990]

779. We also agree with the Joint Board that the base of contributors to universal service should be construed broadly and should include international communications revenues generated by carriers of interstate telecommunications.[1991] Although we agree with PanAmSat that by definition, foreign or international telecommunications are not "interstate" because they are not carried between states, territories, or possessions of the United States,[1992] we find that,

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[1985] Recommended Decision, 12 FCC Rcd at 481.

[1986] *See* 47 U.S.C. §§ 153(22), 153(43), 153(44), 153(46). All interpretations of sections 153 and 254 contained in this section are to be used solely for the purpose of determining universal service contributions.

[1987] 47 U.S.C. § 153(22).

[1988] *See* 47 C.F.R. § 36.154(a).

[1989] CNMI comments at 34.

[1990] *See* 47 U.S.C. § 153(22). Recommended Decision, 12 FCC Rcd at 481.

[1991] *See infra* section XIII.E.

[1992] PanAmSat comments at 3. We note that COMSAT filed with the Commission an Application for Review, or in the Alternative, a Waiver, in the matter of TRS, and the Americans with Disabilities Act of 1990, CC Docket

pursuant to our statutory authority to assess contributions to universal service on an equitable and nondiscriminatory basis, we shall include the foreign telecommunications revenues of interstate carriers within the revenue base.[1993] Contributors that provide international telecommunications services benefit from universal service because they must either terminate or originate telecommunications on the domestic PSTN. Therefore, we find that contributors that provide international telecommunications services should contribute to universal service on the basis of revenues derived from those services. Foreign communications are defined as a "communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside of the United States."[1994] Communications that are billed to domestic end users should be included in the revenue base, including country direct calls[1995] when provided between the United States and a foreign point. Revenues from communications between two international points or foreign countries would not be included in the universal service base, for example, if a domestic end user used country direct calling between two foreign points. We find that carriers that provide only international telecommunications services are not required to contribute to universal service support mechanisms because they are not "telecommunications carriers that provide interstate telecommunications services." We recognize that by this decision, some providers of international services will be treated differently from others. We would prefer a more competitively neutral outcome, all other things being equal, but the statute precludes us from assessing contributions on the revenues of purely international carriers providing service in the United States, even though we believe that they, too, benefit from our universal service policies. We believe that it is nonetheless equitable and nondiscriminatory, given all of the principles that guide our actions here, to assess contributions, where the statute permits it, on the international revenues of carriers providing service in the United States that benefit from universal service. We note that any disparity among providers should be minimal, since most international revenues are today earned by carriers that also provide interstate services, and we further note that our universal service contribution rules will be exactly the same for foreign-owned carriers providing service in the United States as U.S.-owned carriers. Should we become aware of any

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No. 90-571, on March 17, 1995, regarding the Commission's contribution requirements for the interstate TRS Fund. In that filing, COMSAT argues that it should not be considered a carrier that provides interstate telecommunications services because it is largely prohibited from serving the U.S. domestic market. If the Commission disagrees, COMSAT requests that its contribution to TRS be based only on its interstate revenues. COMSAT's Application for Review is still pending.

[1993] *See* 47 U.S.C. 254(d). *See also infra* section XIII.F.

[1994] 47 U.S.C. § 153(17).

[1995] Country direct calls include an automatic or operator-assisted telephone service under which a caller in country X calls a local number to be connected to another carrier's operator in country Y for the purpose of placing a call to a number in country Y. The call is billed at operator-assisted rates for the carrier in country Y. *See* AT&T Country Direct Service Agreement with Telecomunicaciones Internacionales de Argentina Telintar, S.A., *Memorandum Opinion and Order*, DA 96-146, rel. Oct. 21, 1996.

significant competitive concerns in the future, however, we will revisit this issue. A legislative change allowing us to reach the international revenues of all carriers providing service in the United States who benefit from universal service would, of course, provide another solution for any competitive concerns. In addition, we agree with PanAmSat and find that incidental interstate traffic created during the transmission of an international communication should not qualify as "interstate communications" because the limited interstate traffic is unintended by the end user customer.[1996] We conclude, however, that carriers that provide both interstate and foreign telecommunications services must contribute to the extent they provide interstate and foreign telecommunications.[1997]

780. Telecommunications. Telecommunications is defined as a "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[1998] The Recommended Decision included examples of services that the Joint Board believed would meet this definition. To provide more specific guidance as to what services qualify as "telecommunications," we adopt, with slight modification, the Joint Board's list of examples and find that the following services satisfy the above definition and are examples of interstate telecommunications:

> "cellular telephone and paging services; mobile radio services; operator services; PCS; access to interexchange service; special access; wide area telephone service (WATS); toll-free services; 900 services; MTS; private line; telex; telegraph; video services; satellite services; and resale services."

We agree with the Joint Board that "packet switched" services can qualify as interstate telecommunications, but we remove "packet switched" from our list because that term describes how information is transmitted rather than defining a particular service that would be ordered by a customer. Concurring with the Joint Board, we include the revenues of interstate carriers derived from international services in the assessment base, but remove "international or foreign" from our list because, as described above, international or foreign communications are not interstate for the purposes of determining universal service contributions. We agree with the Joint Board that the competitive access services provided by competitive access providers

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[1996] PanAmSat states that, in some limited cases, some of its satellites that are used to provide international service may also include connections between U.S. points. For example, an international network may include multiple terminals located in the U.S. that may communicate with one another during the course of an international transmission. PanAmSat comments at 4. Although, in the process of processing an international transmission, information may be transmitted from one domestic terminal to another, if a domestic end user sought to terminate the transmission in an international point, we will consider such domestic network communications incidental.

[1997] *See infra* section XIII.E.

[1998] 47 U.S.C. § 153(43).

qualify as "interstate telecommunications;" we remove, however, "alternative access" because those services are encompassed within "access to interexchange service." Furthermore, like the Joint Board, we disagree with Illinois CC's position that "access" should be removed from the list of examples of interstate telecommunications for we note that access is a tariffed service that is offered on a common carrier basis to any subscriber ordering it.[1999]

781. We also clarify the scope of contribution obligations for "satellite" and "video" services, which are among the services listed in the exemplary list provided by the Joint Board.[2000] The Joint Board recommended that the Commission adopt "the TRS approach" to identifying providers of interstate telecommunications services.[2001] Under our TRS rules, carriers must contribute to the TRS Fund based on their gross telecommunications services revenues.[2002] Consistent with its recommendation, the Joint Board concluded that satellite operators should contribute to universal service to the extent that they provide "telecommunications services."[2003] Some commenters argued that the services offered by satellite operators do not constitute telecommunications services and therefore should not be included for purposes of universal service contributions.[2004] We adopt the Joint Board's approach and clarify that satellite and video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services. Thus, for example, entities providing, on a common carrier basis, video conferencing services, channel service or video distribution services to cable head-ends would contribute to universal service. Entities providing open video systems (OVS), cable leased access, or direct broadcast satellite (DBS) services would not be required to contribute on the basis of revenues derived from those services.

782. We agree with the Joint Board that this list is not exhaustive. Other services not on the list or services that may be developed may also qualify as interstate telecommunications.

783. We acknowledge, as the Utah PSC notes, this list is expansive;[2005] nonetheless, we believe that broadly construing the definition of interstate telecommunications is consistent with

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[1999] Illinois CC comments at 6.

[2000] Recommended Decision, 12 FCC Rcd at 481.

[2001] Recommended Decision, 12 FCC Rcd at 482.

[2002] 47 C.F.R. § 64.604(c)(2)(iii)(A).

[2003] Recommended Decision, 12 FCC Rcd at 482.

[2004] *See, e.g.*, DIRECTV comments at 3-4.

[2005] Utah PSC comments at 5. *See also* Georgia PSC reply comments at 35-36.

the statute and necessary to achieve our policy goals and those of the Joint Board in this Order. By defining "telecommunications" broadly, we will broaden the base of mandatory contributors and will reduce the burden and possible impact on individual carriers' prices. It is also competitively neutral to require all carriers and "other providers of interstate telecommunications" to contribute to the support mechanisms because it reduces the possibility that carriers with universal service obligations will compete directly with carriers without such obligations.

784. For a Fee. We agree with the Joint Board's interpretation of the plain language of section 3(46) and find that the plain meaning of the phrase "for a fee" means services rendered in exchange for something of value or a monetary payment.[2006] We do not find persuasive UTC's argument that "for a fee" means "for-profit."[2007] We do not assume that Congress intended to limit "telecommunications services" to those which are offered "for-profit" when Congress could have, but did *not*, so state. In response to LCRA's request, we note that cost sharing for the construction and operation of private telecommunications networks does not render participants "telecommunications carriers" because such arrangements do not involve service "directly to the public."[2008]

785. Directly to the Public. We find that the definition of "telecommunications services" in which the phrase "directly to the public" appears is intended to encompass only telecommunications provided on a common carrier basis. This conclusion is based on the Joint Explanatory Statement, which explains that the term telecommunications service "is defined as those services and facilities offered on a 'common carrier' basis, recognizing the distinction between common carrier offerings that are provided to the public . . . and private services."[2009] Federal precedent holds that a carrier may be a common carrier if it holds itself out "to service

[2006] 47 U.S.C. § 153(46). *See* Recommended Decision, 12 FCC Rcd at 483.

[2007] UTC comments at 4-5.

[2008] LCRA comments at 7-8. *See also* Ad Hoc comments at 21-22; APPA comments at 5-10; UTC comments at 6; UTC reply comments at 2-3. We have defined cost "sharing" as a "non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying the communications-related costs associated therewith according to its pro rata usage of the communications services and facilities." Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, *Report and Order*, 60 FCC 2d 261 at para. 4 (1976). *See also Local Competition Order*, 11 FCC Rcd at 15990. In addition, as discussed in section X. of this Order, schools and libraries may join consortia to purchase eligible telecommunications services. If a consortium creates a billing system in which one school or library pays for the entire consortium's bill and receives reimbursement from the other members for their portion of the bill, the school or library responsible for paying the bill will not be considered a "telecommunications carrier."

[2009] Joint Explanatory Statement at 115.

indifferently all potential users."[2010] Such users, however, are not limited to end users. Common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.[2011] Precedent further holds that a carrier will not be a common carrier "where its practice is to make individualized decisions in particular cases whether and on what terms to serve."[2012]

786. In light of the legislative history and precedent discussed above, we conclude that only common carriers should be considered mandatory contributors to the support mechanisms. We agree with the Joint Board's recommendation that any entity that provides interstate telecommunications to users other than significantly restricted classes[2013] for a fee should contribute to the support mechanisms.[2014] We find, however, that the statute supports reaching the Joint Board's goal under our permissive authority rather than our mandatory authority. We agree with the Joint Board that private network operators that lease excess capacity on a non-common carrier basis should contribute to universal service support; we do not, however, include them in the category of mandatory contributors.[2015] We classify these service providers as "other providers of interstate telecommunications" because we find that private network operators that lease excess capacity on a non-common carrier basis are not common carriers or mandatory contributors under the first sentence of section 254(d). Nevertheless, we find that, pursuant to our permissive authority, the public interest requires them, as providers of interstate telecommunications, to contribute to universal service because they compete against telecommunications carriers in the provision of interstate telecommunications.[2016] We discuss the exercise of our permissive authority at great length in section XIII.C., below.

b. Particular Cases

[2010] *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II).*

[2011] *See* 47 C.F.R. § 69; *see generally* MTS and WATS Market Structure, Phase I, *Third Report and Order*, CC Docket 78-72, 93 FCC 2d 241, paras. 13, 23 (1982) (access charges are regulated services and include "carrier's carrier" services).

[2012] *NARUC II*, 533 F.2d at 608.

[2013] The *CMRS 2nd R&O* stated that significantly restricted classes included, for example, maritime use only and public safety use only. Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, FCC 94-31, 9 FCC Rcd 1411, 1439 (1994) (*CMRS 2nd R&O*). *See infra* section XIII.C.

[2014] Recommended Decision, 12 FCC Rcd at 483.

[2015] Recommended Decision, 12 FCC Rcd at 483.

[2016] *See infra* section XIII.C.

787. We agree with the Joint Board and, contrary to commenters who argue that their particular industry or company should be exempt from contribution requirements,[2017] find no reason to exempt from contribution any of the broad classes of telecommunications carriers that provides interstate telecommunications services, including satellite operators, resellers, wholesalers, paging companies, utility companies, or carriers that serve rural or high cost areas, because the Act requires "every telecommunications carrier that provides interstate telecommunications services" to contribute to the support mechanisms.[2018] Thus, we agree with the Joint Board that any entity that provides interstate telecommunications services, including offering any of the services identified above for a fee directly to the public or to such classes of users as to be effectively available directly to the public, must contribute to the support mechanisms.

788. Furthermore, we agree with the Joint Board that information service providers (ISP) and enhanced service providers are not required to contribute to support mechanisms to the extent they provide such services. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[2019] The Commission's rules define "enhanced services" as "services offered over common carrier transmission facilities used in interstate communications which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[2020] The definition of enhanced services is substantially similar to the definition of information services. In the *Non-Accounting Safeguards First Report and Order*, in which the Commission found that all services previously considered "enhanced services" are "information services," the Commission indicated that, to ensure regulatory certainty and continuity, it was preserving the definitional scheme by which certain services (enhanced and

[2017] *See, e.g.*, Celpage comments at 3-5 (paging providers); DIRECTV comments at 2-4 (multichannel video programming distributors); GE Americom comments at 7-9 (satellite space segment operators); Keystone Communications comments at 6 (broadcast transmission providers); Rural Electric Coop. comments at 2 (non-common carriers); UTC comments at 4-5 (utility and pipeline companies).

[2018] 47 U.S.C. § 254(d).

[2019] 47 U.S.C. § 153(20).

[2020] 47 C.F.R. § 64.702. *See also* North American Telecommunications Association, Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services and Customer Premises Equipment, *Report and Order*, 101 FCC 2d 349 (1985), *recon.* 3 FCC Rcd 4385 (1988).

information services) are exempted from regulation under Title II of the Act.[2021]

789. The office of Senator Stevens asserts that information services are inherently telecommunications services because information services are offered via "telecommunications."[2022] We observe that ISPs alter the format of information through computer processing applications such as protocol conversion and interaction with stored data, while the statutory definition of telecommunications only includes transmissions that do not alter the form or content of the information sent.[2023] When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering. The language in section 254(h)(2) also indicates that information services are not inherently telecommunications services.[2024] Section 254(h)(2) states that the Commission must enhance access to advanced telecommunications and information services.[2025] If information services were a subset of advanced telecommunications, it would be repetitive to list specifically information services in that subsection.[2026]

790. The classification of information services, and especially Internet-based services, raises many complicated and overlapping issues, with implications far beyond section 254. We agree with the Joint Board that we should re-evaluate which services qualify as information services in a separate proceeding in which we take into account changes in technology and the regulatory environment. We have issued a Notice of Inquiry seeking comment on the treatment of Internet access and other information services that use the public switched network.[2027] We

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[2021] *See* Implementation of the Non-Accounting Safeguards of sections 271 and 272 of the Communications Act of 1934, *First Report and Order & FNPRM*, FCC 96-489, at para. 102 (rel. Dec. 24, 1996) (*Non-Accounting Safeguards First Report and Order*).

[2022] *See* Letter from Timothy A. Peterson, FCC to William F. Caton, FCC, regarding meeting among FCC and Sen. Stevens staff, dated March 13, 1997. *See also* Netscape Comments at 6 and reply comments at 3, setting out a similar argument.

[2023] 47 U.S.C. § 153(44). Telecommunications services, by definition, do not involve a "change in the form of contents of [the user's] information as sent or received," whereas information services, although provided via telecommunications, by definition involve "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." *See* discussion of enhanced services at Amendment of Section 64.702 of the Commission's Rules and Regulations, *Report and Order*, 2 FCC Rcd 3072, 3080 (1987).

[2024] 47 U.S.C. § 254(h)(2). *See supra* section X.B.2.b.

[2025] 47 U.S.C. § 254(h)(2).

[2026] *See supra* section X.B.2.b.

[2027] Use of the Public Switched Network by Information Service and Internet Access Providers, *Notice of Inquiry*, CC Docket No 96-263 (released Dec. 24, 1996).

intend in that proceeding to review the status of ISPs under the 1996 Act in a comprehensive manner.

791. With respect to the issue of whether states may require CMRS providers to contribute to state universal service support mechanisms, we agree with the Joint Board and find that section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state support mechanisms. Section 254(f) states that states may require telecommunications carriers that provide intrastate telecommunications services to make equitable and nondiscriminatory contributions to state support mechanisms.[2028] Section 332(c)(3) prohibits states from regulating the rates charged by CMRS providers. Section 332(c)(3) also states that "[n]othing *in this subparagraph* shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such [s]tate)" from state universal service requirements.[2029] Several commenters argue that section 332(c)(3) prohibits states from requiring CMRS providers operating within a state to contribute to state universal service programs unless the CMRS provider's service is a substitute for land line service in a substantial portion of the state.[2030] The Joint Board, however, disagreed. California PUC has adopted this interpretation and has required CMRS providers in California to contribute to the state's programs for Lifeline and high cost small companies since January 1, 1995.[2031] A Connecticut state court, however, has ruled that section 332(c)(3) prohibits Connecticut from assessing contributions against CMRS providers for intrastate universal service programs.[2032]

792. We disagree with BANM that interpreting sections 332(c)(3) and 254(f) is a violation of the notice and comment requirements of the Administrative Procedure Act (APA).[2033] Section 553(b) of the APA requires federal agencies to provide notice of all proposed rules in the Federal Register.[2034] Section 553(b)(3)(A) of the APA, however, provides an exception to the notice requirement for interpretive rules and general statements of policy. As

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[2028] 47 U.S.C. § 254(f).

[2029] 47 U.S.C. § 332(c)(3) (emphasis added).

[2030] *See, e.g.*, BANM comments at 6-10; Celpage comments at 6-7; CTIA comments at 13-16; Nextel comments at 3-6; PageMart comments at 2-3; PageNet comments at 14; AirTouch reply comments at 35-38; Arch reply comments at 4-6; UTC reply comments at 7-8.

[2031] California PUC, Decision 94-09-065, 56 CPUC2d 290.

[2032] *See Metro Mobile Cts. v. Connecticut Dept. of Public Utility Control*, No. CV-95-05512758 (Conn. Super. Ct., Judicial Dist. of Hartford-New Britain, Dec. 9, 1996).

[2033] BANM comments at 2.

[2034] 5 U.S.C. § 553(b).

we are not adopting a substantive rule, we find that we have complied with the notice and comment requirements of the APA.

C. Other Providers of Interstate Telecommunications

1. Background

793. Section 254(d) also states that the Commission may require "[a]ny other provider of interstate telecommunications" to contribute to universal service, "if the public interest so requires."[2035] Pursuant to the definitions discussed above, a provider of interstate telecommunications would provide "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[2036] Unlike providers of interstate telecommunications services, however, providers of interstate telecommunications would not offer telecommunications "for a fee directly to the public" (i.e., it would not be telecommunications offered on a common carrier basis).[2037] Congress noted this distinction when it stated that an entity can offer telecommunications on a private-service basis without incurring obligations as a common carrier.[2038] In the NPRM, the Commission asked if the public interest requires us to extend support obligations to "[a]ny other provider[s] of interstate telecommunications," and, if so, which categories of providers, other than telecommunications carriers, should be so obligated.[2039] The Joint Board recommended that "other providers of interstate telecommunications," entities that provide telecommunications that meet the entity's internal needs or that are provided free-of-charge, should not be required to contribute to the support mechanism.[2040]

2. Discussion

794. We require all the entities identified by the Joint Board in its Recommended Decision to contribute to the support mechanisms, subject to the slight modification discussed above regarding carriers that provide only international services. Because of the statutory language and legislative history discussed above, however, we reach the result recommended by

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[2035] 47 U.S.C. § 254(d).

[2036] 47 U.S.C. § 153(43).

[2037] 47 U.S.C. § 153(46).

[2038] Joint Explanatory Statement at 115.

[2039] NPRM at para. 119.

[2040] Recommended Decision, 12 FCC Rcd at 485.

the Joint Board in a slightly different manner. We find under our permissive authority over "other providers of telecommunications" that the public interest requires private service providers that offer their services to others for a fee and payphone aggregators to contribute to our support mechanisms. Although the Joint Board did not recommend that we exercise this permissive authority,[2041] the Joint Board based this recommendation on the assumption that private service providers that offer their services to others for a fee and payphone aggregators fell within the category of service providers governed by the mandatory provision of section 254(d).[2042] Given that we could not reach these parties under the mandatory provision, we reach them here instead.

795. We find that the principle of competitive neutrality, recommended by the Joint Board and adopted by the Commission, suggests that we should require certain "providers of interstate telecommunications" to contribute to the support mechanisms. Whether a business decides to sell telecommunications services to others on a common carrier or private contractual basis or through a separate corporate entity should not determine contribution obligations, because in either event the entity offers telecommunications to others for a fee. In addition, we do not want contribution obligations to shape business decisions, and we do not want to discourage carriers from continuing to offer their common carrier services. Therefore, we find that the public interest requires both private service providers that offer interstate telecommunications to others for a fee and payphone aggregators to contribute to the preservation and advancement of universal service in the same manner as carriers that provide "interstate telecommunications services" because this approach reduces the possibility that carriers with universal service obligations will compete directly with carriers without such obligations. In addition, the inclusion of such providers as contributors to the support mechanisms will broaden the funding base, lessening contribution requirements on telecommunications carriers or any particular class of telecommunications providers.

796. Although some private service providers serve only their own internal needs, some provide services or lease excess capacity on a private contractual basis. The provision of services or the lease of excess capacity on a private contractual basis alone does not render these private service providers common carriers and thus mandatory contributors. We find justification, however, pursuant to our permissive authority, for requiring these providers that provide telecommunications to others in addition to serving their internal needs to contribute to federal universal service on the same basis as telecommunications carriers. Without the benefit of access to the PSTN, which is supported by universal service mechanisms, these providers would be unable to sell their services to others for a fee. Accordingly, these providers, like telecommunications or common carriers, have built their businesses or a part of their businesses

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[2041] Recommended Decision, 12 FCC Rcd at 485.

[2042] *See* Recommended Decision, 12 FCC Rcd at 482-483, 486 (indicating that all entities that provide interstate telecommunications to entities other than themselves will be mandatory contributors).

on access to the PSTN, provide telecommunications in competition with common carriers, and their non-common carrier status results solely from the manner in which they have chosen to structure their operations. Even if a private network operator is not connected to the PSTN, if it provides telecommunications, it competes with common carriers, and the principle of competitive neutrality dictates that we should secure contributions from it as well as its competitors. Thus, pursuant to our permissive authority, we find that the public interest requires private service providers that offer services to others for a fee on a non-common carrier basis to contribute to the support mechanisms. We reiterate that cable leased access providers, OVS providers, and DBS providers would not be required to contribute pursuant to our permissive authority to require contributions from providers of interstate telecommunications.

797. We agree with RBOC Payphone Coalition that payphone service providers are not telecommunications carriers because they are "aggregators."[2043] Payphone service providers do, however, provide interstate telecommunications and thus are subject to our permissive authority to require contributions if the public interest so requires. Telecommunications carriers that provide payphone services must contribute on the basis of their telecommunications revenues, including the revenues derived from their payphone operations, because payphone revenues are revenues derived from end users for telecommunications services.[2044] If we did not exercise our permissive authority, aggregators that provide only payphone service would not be required to contribute, while their telecommunications carrier competitors would. We do not want to create incentives for telecommunications carriers to alter their business structures by divesting their payphone operations in order to reduce their contributions to the support mechanisms. Thus, we find that because payphone aggregators are connected to the PSTN and because they directly compete with mandatory contributors to universal service the public interest requires payphone providers to contribute to the support mechanisms.

798. We do not wish, however, to require contributions from payphone aggregators, such as beauty shop or grocery store owners, retail establishment franchisees, restaurant owners, or schools that provide payphones primarily as a convenience to the customers of their primary business and do not provide payphone services as part of their core business. The provision of a payphone is merely incidental to their primary non-telecommunications business and constitutes a minimal percentage of their total annual business revenues. We anticipate that these entities

[2043] Section 153(44) explicitly excludes aggregators from the definition of "telecommunications carrier." Aggregators are defined as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2). *See also* Letter from Michael K. Kellogg, RBOC Payphone Coalition to William F. Caton, FCC, dated April 15, 1997 (explaining that aggregators are not telecommunications carriers).

[2044] As discussed in section XIII.F., *infra*, we conclude that contributions to the universal service support mechanisms should be based on end-user telecommunications revenues.

will qualify for the *de minimis* exemption[2045] and that they will not be required to contribute because their contributions will be less than $100.00 per year. If their contributions exceed the *de minimis* level, however, they will be required to contribute.

799. Finally, we agree with the Joint Board that those "other providers of telecommunications" that provide telecommunications solely to meet their internal needs should not be required to contribute to the support mechanisms at this time, because telecommunications do not comprise the core of their business. Private network operators that serve only their internal needs do not lease excess capacity to others and do not charge others for use of their network. Thus, we find that they have not structured their businesses around the provision of telecommunications to others. In addition, it would be administratively burdensome to assess a special non-revenues-based contribution on these providers because they do not derive revenues from the provision of services to themselves.

800. In response to LCRA's request for clarification,[2046] we note that cost-sharing for the construction and operation of private networks would not render participants "other providers of telecommunications" that must contribute to the support mechanisms because the participants are a consortium of customers of a carrier. If, however, a lead participant owned and operated its own telecommunications network and received monetary payments for service from other participants, the lead participant would be a provider of telecommunications and, if it provided interstate telecommunications, would be included within the group that we require to contribute to the support mechanisms, subject to the *de minimis* exemption. We also find, however, that government entities that purchase telecommunications services in bulk on behalf of themselves, e.g., state networks for schools and libraries, will not be considered "other providers of telecommunications" that will be required to contribute. Such government entities would be purchasing services for local or state governments or related agencies. Therefore, we find that such government agencies serve only their internal needs and should not be required to contribute. Similarly, we conclude that public safety and local governmental entities licensed under Subpart B of Part 90 of our rules[2047] will not be required to contribute because of the restrictive eligibility requirements for these services and because of the important public safety and welfare functions for which these services are used. Similarly, if an entity exclusively provides interstate telecommunications to public safety or government entities and does not offer services to others, that entity will not be required to contribute.

D. The *De Minimis* Exemption

[2045] *See infra* section XIII.D.

[2046] LCRA comments at 7-8. *See also* Ad Hoc comments at 21-22; APPA comments at 5-10; UTC comments at 6; UTC reply comments at 2-3. *See Local Competition Order*, 11 FCC Rcd at 15,990.

[2047] 47 C.F.R. §§ 90.15 - 90.27.

1. Background

801. The Commission may exempt a carrier or class of carriers from contributing to the universal service mechanisms "if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be *de minimis*."[2048] In the NPRM, the Commission sought comment on whether we should establish rules of general applicability for exempting very small telecommunications carriers, and if so, what the basis should be for determining that the administrative cost of collecting support would exceed a carrier's potential contribution.[2049] Within those parameters, the Commission also specifically sought comment on measures to avoid significant economic harm to small business entities, as defined by section 601(3) of the Regulatory Flexibility Act.[2050] In the Further Comment Public Notice, the Commission asked what levels of administrative costs should be expected per carrier under the various methods that have been proposed for funding (e.g., gross revenues, revenues net of payments to other carriers, retail revenues, etc.).[2051] The Joint Board recommended that the Commission exempt from contribution and reporting requirements all carriers for which the amount of the contribution due would exceed the administrative cost of collection.[2052] The Joint Board also recommended that small carriers not be treated differently than large carriers.[2053]

3. Discussion

802. We adopt the Joint Board's view that contributors whose contributions are less than the administrator's administrative costs of collection should be exempt from reporting and contribution requirements.[2054] Section 254(d) itself does not provide specific guidance on how the Commission should exercise its authority to exempt carriers whose contributions would be *de minimis*. The Joint Explanatory Statement, however, states the congressional expectation that "this authority would only be used in cases where the administrative cost of collecting contributions from a carrier or carriers would exceed the contribution that carrier would

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[2048] 47 U.S.C. § 254(d).

[2049] NPRM at para. 120.

[2050] 5 U.S.C. § 601(3).

[2051] Further Public Notice at 9.

[2052] Recommended Decision, 12 FCC Rcd at 489.

[2053] Recommended Decision, 12 FCC Rcd at 490.

[2054] Recommended Decision, 12 FCC Rcd at 489.

otherwise have to make under the formula for contributions selected by the Commission."[2055] Thus, we find that the legislative history of section 254(d) clarifies Congress's intent that this exemption be narrowly construed. It also clarifies that the purpose of the *de minimis* exemption is to prevent waste resulting from requiring contributions when the administrative costs of collecting them will exceed the amounts collected. Thus, we adopt the Joint Board's recommendation and reject commenters' arguments in support of other factors for determining when a carrier providing interstate telecommunications services should be exempt from the statutory obligation to contribute to federal universal service support mechanisms.[2056]

803. We agree with the Joint Board and disagree with Teleport, which advocates basing the exemption on the administrator's and contributors' costs, and conclude that the cost of collection should encompass only the administrator's costs to bill and collect individual carrier contributions.[2057] Although we agree that a *de minimis* exemption, as defined above, will serve the public interest, commenters did not submit data regarding the incremental cost of collection for the record. We will adopt the $100.00 minimum contribution requirement used for TRS contribution purposes[2058] because we assume that the administrator's administrative costs of collection could possibly equal as much as $100.00. Therefore, if a contributor's contribution would be less than $100.00, it will not be required to contribute or comply with reporting requirements. In response to Metricom's assertions that it will be difficult to identify unlicensed Part 15 providers,[2059] we note that the $100.00 estimate is high and should be sufficient to encompass all administrative costs.[2060] We instruct the administrator, however, to re-evaluate incremental administrative costs, taking into account inflation, after the contribution mechanisms have been implemented.

804. We agree with the Joint Board that the *de minimis* exemption is the only basis upon which to exempt contributors.[2061] Therefore, we disagree with commenters that suggest that the exemption criteria for carriers that are ineligible to receive support should be different

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[2055] Joint Explanatory Statement at 131 (1996).

[2056] *See, e.g.*, Metricom comments at 4-6; Rural Electric Coop. comments at 3; Teleport comments at 11.

[2057] Teleport comments at 11.

[2058] *See* 47 C.F.R. § 64.604(c)(4)(iii)(B).

[2059] Metricom comments at 4-6.

[2060] In comments to the Recommended Decision, NECA estimated administrative costs to be approximately $20.00 per contributor. *See* Recommended Decision, 12 FCC Rcd at 489.

[2061] Recommended Decision, 12 FCC Rcd at 490.

from those applying to "eligible" carriers.[2062] We find nothing to indicate a congressional intent to interpret the *de minimis* exemption in this way. Congress required all telecommunications carriers to contribute to universal service support mechanisms but provided that only "eligible" carriers should receive support, and gave no direction to the Commission to establish preferential treatment for carriers that are ineligible for support.

805. We reject Celpage's argument that requiring contributions by paging carriers represents an unconstitutional tax because paging carriers do not derive any benefit from universal service.[2063] First, we note that although some paging carriers may be ineligible to receive support, all telecommunications carriers benefit from a ubiquitous telecommunications network. Customers who receive pages would not be able to receive or respond to those pages absent use of the PSTN. Second, as we explained above, our contribution requirements do not constitute a tax.[2064] Therefore, contrary to Celpage's arguments, requiring paging companies to contribute to the support mechanisms does not present constitutional problems. Some commenters also argue that carriers ineligible to receive support should be allowed to make reduced contributions to universal service.[2065] Because section 254(d) states that "every telecommunications carrier that provides interstate telecommunications services" must contribute to universal service and does not limit contributions to "eligible carriers," we agree with the Joint Board and reject these arguments. Thus, we find that the *de minimis* exemption cannot and should not be interpreted to allow reduced contributions or contribution exemptions for ineligible carriers.

E. Scope of the Commission's Authority Over the Universal Service Support Mechanisms

1. Overview

806. In determining the appropriate scope of the revenue base for federal universal service support, the Joint Board Recommended Decision stressed that the 1996 Act "reflects the

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[2062] *See, e.g.*, Arch comments at 3-6; Celpage comments at 9-10; PageMart comments at 7-8; PageNet comments at 10-13; PNPA comments at 3-5; AirTouch reply comments at 25; Centennial reply comments at 3-4 (claiming that unless its CMRS is a substitute for land line service, CMRS operator should make reduced contribution).

[2063] Celpage comments at 3-5. *See also* PNPA comments at 5-6.

[2064] *See supra* section X.F.2.

[2065] PageMart comments at 7-8. *See also* Arch comments at 3-6; Celpage comments at 9-10; PageNet comments at 10-13; PNPA comments at 3-5; AirTouch reply comments at 25; Centennial reply comments at 3-4 (claiming unless its CMRS is a substitute for land line service, CMRS operator should make reduced contribution).

continued partnership among the states and the Commission in preserving and advancing universal service."[2066] Ultimately, the Recommended Decision concluded that the "role of complementary state and federal universal service mechanisms require[d] further reflection" before the Joint Board could make a recommendation as to whether the revenue base for the federal universal support mechanisms for the high cost and low-income assistance programs should be based on intrastate as well as interstate revenues.[2067] Nonetheless, the Joint Board was able to recommend that "universal support mechanisms for schools and libraries and rural health care providers be funded by assessing both the intrastate and interstate revenues of providers of interstate telecommunications services."[2068]

807. Although we conclude that section 254 grants the Commission the authority to assess contributions for the universal service support mechanisms for rural, insular, and high cost areas and low income consumers from intrastate as well as interstate revenues and to require carriers to seek authority from states to recover a portion of the contribution in intrastate rates, we decline to exercise the full extent of our authority. The decision to decline to exercise the entirety of our authority is intended to promote comity between the federal and state governments and is based on our respect for the states' historical expertise in providing for universal service.

808. There are three dimensions to determining how the recovery component of the federal universal service mechanisms will work. The first dimension is determining the total amount of support required to meet the federal obligation imposed by section 254. This issue is addressed elsewhere in this Order, specifically in section IV where we determine which services we will support and in sections VII and VIII where we determine the appropriate amount of support for the high cost and low-income support mechanisms and sections X and XI, where we determine the appropriate amount of support for schools, libraries, and rural health care providers. The second dimension to our inquiry is whether we should assess carriers' contributions to the universal service support mechanisms from interstate revenues only or from interstate and intrastate revenues. As to the second dimension, we adopt the Joint Board's recommendation "that universal service support mechanisms for schools and libraries and rural health care providers be funded by assessing both the intrastate and interstate revenues of providers of interstate telecommunications services."[2069] The Joint Board determined that it was premature for it to recommend that we assess carriers' contributions for the high cost and low-income support mechanisms based on carriers' intrastate as well as interstate revenues. We have decided to continue to assess carriers' contributions for the high cost and low-income support

[2066] Recommended Decision, 12 FCC Rcd at 500.

[2067] Recommended Decision, 12 FCC Rcd at 501.

[2068] Recommended Decision, 12 FCC Rcd at 499.

[2069] Recommended Decision, 12 FCC Rcd at 499.

mechanisms based only upon the carriers' interstate revenues because we want to continue to work with the Joint Board on this issue to develop a unified approach to the low-income and high cost mechanisms and because we believe that in the meantime the states will continue to provide for the high cost and low-income mechanisms in such a manner that the mechanisms will be sufficiently funded.

809. The third dimension to our inquiry is whether carriers may recover their contributions to the universal service support mechanisms through rates for interstate services or through a combination of rates for interstate and rates for intrastate services. The Joint Board did not address this question. Because the Joint Board did not recommend that we authorize carriers to recover their contributions via rates for intrastate services, we conclude that at least for the present we should maintain our traditional method of providing for recovery, which permits carriers to recover their federal universal service contributions through rates for interstate services only. As described below, we believe that this approach will best promote the continued affordability of basic residential service. For the same reason, i.e., to maintain and promote the affordability of basic residential service, we also are declining to create a single interstate fee that would be paid by basic residential dialtone subscribers. We will, however, continue to seek guidance from the Joint Board as to whether carriers should be required to seek state authorization to recover a portion of the universal service contribution in intrastate rates, rather than in interstate rates alone.

2. Background

810. The Joint Board recommended that support for eligible schools, libraries, and rural health care providers be based on revenues derived from interstate and intrastate telecommunications services but did not issue a recommendation regarding the revenue funding base for support for high cost areas or low-income consumers.[2070]

811. As detailed in Appendix J containing the comment summaries, the commenters generally disagreed as to whether intrastate telecommunications revenues should be included when assessing carrier contributions to the support mechanisms and as to whether the Commission has the statutory authority to include those revenues.

812. On April 24, 1997, a majority of the state members of the Joint Board filed a report with the Commission discussing their recommendations on the funding of the universal

[2070] Recommended Decision, 12 FCC Rcd at 499. Two of the state members of the Joint Board, Commissioner McClure and Commissioner Schoenfelder, dissented from that portion of the Recommended Decision that recommended that the support mechanisms for eligible schools, libraries, and rural health care providers be based on revenues derived from intrastate as well as interstate revenues. Recommended Decision, 12 FCC Rcd at 571, 576.

service support mechanisms.[2071] The majority state members of the Joint Board recommended that all of the universal service mechanisms be supported "through an assessment on the interstate and intrastate revenues of interstate telecommunications carriers."[2072] The majority state members also concluded, however, that if implementation of the modified high cost support mechanisms "must await further refinement" of a forward-looking cost methodology, then they would "support an interim policy of assessing only interstate revenues."[2073] Commissioners McClure and Schoenfelder dissented from the majority state members' conclusion that the Commission should assess contributions for the support mechanisms from intrastate as well as interstate revenues.[2074]

3. Discussion

a. General Jurisdiction Over Universal Service Support Mechanisms

813. For the reasons described below, we conclude that the Commission has jurisdiction to assess contributions for the universal service support mechanisms from intrastate as well as interstate revenues and to require carriers to seek state (and not federal) authority to recover a portion of the contribution in intrastate rates. Although we expressly decline to exercise the entirety of this jurisdiction, we believe it is important to set forth the contours of our authority in this Order.

814. Our authority over the universal service support mechanisms is derived first and foremost from the plain language of section 254. First, section 254(a) provides that rules "to implement" the section are to be recommended by the Joint Board, and those recommendations, in turn, are to be implemented by the Commission.[2075] Thus, the Commission has the ultimate responsibility to effectuate section 254. Further, Congress reemphasized the Commission's authority independent of the Joint Board by directing in section 254(c)(2) that the concept of universal service is an "evolving level of telecommunications *that the Commission shall*

[2071] Majority Opinion of the State Members of the Joint Board on the Funding of Universal Service, dated Apr. 24, 1997 ("Majority State Members' Jurisdiction Report").

[2072] Majority State Members' Jurisdiction Report at 1.

[2073] Majority State Members' Jurisdiction Report at 2.

[2074] Dissenting Statement of Commissioner Kenneth McClure and Commissioner Laska Schoenfelder, filed Apr. 23, 1997 ("McClure/Schoenfelder Dissent").

[2075] 47 U.S.C. § 254(a)(2).

establish periodically."[2076] Thus, Congress expressly authorized the Commission to define the parameters of universal service.[2077]

815. Section 254(d) also mandates that interstate telecommunications carriers "shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and *sufficient* mechanisms established by the Commission to preserve and advance universal service."[2078] In thus prescribing that the support mechanisms be "sufficient," Congress obligated the Commission to ensure that the support mechanisms satisfy section 254's goal of "preserving and advancing universal service," consistent with the principles set forth in section 254(b), including the principle that quality services should be available at "just, reasonable, and affordable rates."[2079] In so doing, Congress expressly granted the Commission jurisdiction to establish support mechanisms of a sufficient size adequately to support universal service.

816. In essence, the provisions of section 254 direct that the Commission ultimately prescribe what services should be supported, and they mandate that the Commission ensure that the support for those services is "specific, predictable, and sufficient."[2080] Although the states are independently obligated to ensure that support mechanisms are "specific, predictable, and sufficient" and that rates are "just, reasonable, and affordable,"[2081] there is no doubt that the Commission -- with the help of the states -- is to establish in the first instance what services should be supported and what are the necessary mechanisms to do so. This is because the states' authority to adopt sufficient support mechanisms is restricted to only those mechanisms that are consistent with and do not burden the federal mechanisms.[2082] Because state universal service mechanisms must be consistent and must not conflict with the federal mechanisms, it is

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[2076] 47 U.S.C. § 254(c)(1) (emphasis added).

[2077] Congress expressly directed the Commission to initiate a proceeding to implement Section 254. 47 U.S.C. § 254(a)(1). Thus, there can be no doubt that Congress intended the Commission to promulgate regulations to effectuate section 254. *See* 47 U.S.C. § 254(a)(1)&(2). Of course, the Commission also possesses "expansive" rulemaking authority over all provisions of the Communications Act, and in particular over the provisions of Title II of the Communications Act, of which Section 254 is a part. *See* 47 U.S.C. §§ 154(i), 201(b), 303(r); *NBC v. United States*, 319 U.S. 190, 219 (1943).

[2078] 47 U.S.C. § 254(d) (emphasis added). *See also* 47 U.S.C. § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.")

[2079] 47 U.S.C. § 254(b)(1); 47 U.S.C. § 254(i) ("The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.").

[2080] 47 U.S.C. § 254(d); *see also* 47 U.S.C. § 254(b)(5).

[2081] 47 U.S.C. §§ 254(b)(5), (d), (i).

[2082] 47 U.S.C. § 254(f).

reasonable to conclude that section 254 grants the Commission the primary responsibility and authority to ensure that universal service mechanisms are "specific, predictable, and sufficient" to meet the statutory principle of "just, reasonable, and affordable rates."[2083] The fact that the Commission has this authority does not preclude the Commission from continuing to work with the states to provide for universal service, so long as this partnership results in support mechanisms that comply with the mandates of section 254.

817. Congress recognized that the services supported by the universal service support mechanisms would include both intrastate and interstate services. For example, in section 254(b)(3), Congress established the principle that the Commission is to formulate its universal service rules and policies so that "[c]onsumers in all regions of the Nation . . . have access to telecommunications and information services, including interexchange services."[2084] The fact that universal service *includes* access to interexchange services, the traditional focus of federal telecommunications law, shows that universal service includes *more* than access to interexchange services. Indeed, the traditional core goal of universal service has been to ensure that basic residential telephone service, which is primarily an intrastate service, is affordable. The goal of keeping basic residential rates low traditionally has been advanced by both the FCC and the state commissions, which have kept intrastate residential rates low by means of implicit support mechanisms such as allowing LECs to raise rates on business lines and on vertical services such as call waiting to levels greater than those that would be charges in a competitive market. In section 254(b), Congress made affordable basic service a goal of federal universal service, by that determination, Congress meant that both interstate and intrastate services should be affordable.[2085] The Joint Board agreed with this conclusion by including intrastate services on the list of telecommunications services that it recommended for universal service support pursuant to section 254(c). Congress also directed the Commission and the states to strive to make implicit support mechanisms explicit. We have found nothing in the statute or legislative history to show that, notwithstanding Congress's mandate to make universal service subsidies explicit, Congress intended to alter the current arrangement by requiring interstate services to assume the entire burden of providing for universal service. Accordingly, the section 254 mandate covers both interstate and intrastate services and therefore it is also reasonable that the Commission, in ensuring that the overall amount of the universal support mechanisms is "specific, predictable, and sufficient," may also mandate that contributions be based on carriers' provision of intrastate services. As discussed below, however, we decline to exercise the full extent of this authority out of respect for the states and the Joint Board's expertise in protecting universal service.

[2083] 47 U.S.C. § 254(b)(1) & (5), (d), (i).

[2084] 47 U.S.C. § 254(b)(3).

[2085] As discussed below, we are accomplishing the goal of affordable service for eligible schools, libraries, and rural health care providers by assessing contributions based on both interstate and intrastate revenues.

818. We fully appreciate and support the continuation of the historical informal partnership between the states and the Commission in preserving and advancing the universal service support mechanisms envisioned by section 254. Indeed, we believe that section 254 envisions the continuation of this partnership. We conclude nonetheless that this partnership does not affect the Commission's jurisdiction to assess contributions sufficient to meet that need from both interstate and intrastate revenues. Indeed, in recommending that we assess contributions based on intrastate and interstate revenues, the Majority State Members' Jurisdiction Report recognized that section 254 "represents a significant departure from the current method of funding existing universal service mechanisms," but that there still is a "need for federal and state regulators to manage the transition to competitive markets together."[2086] We have concluded that we will assess contributions for the support mechanisms for eligible schools, libraries, and rural health care providers from intrastate and interstate revenues. We also conclude that, when we assess contributions based on intrastate as well as interstate revenues, we have the authority to refer carriers to the states to seek authority to recover a portion of their intrastate contribution from intrastate rates. We have not adopted this approach in this Order. In section 254(f) Congress expressly allowed only for those state universal service mechanisms that are not "inconsistent with the Commission's rules to preserve and advance universal service."[2087] Thus, the statutory scheme of section 254 demonstrates that the Commission ultimately is responsible for ensuring sufficient support mechanisms, that the states are encouraged to become partners with the Commission in ensuring sufficient support mechanisms, and that the states may prescribe additional, supplemental mechanisms.[2088] Section 254 also *permits* the Commission to coordinate with the states in establishing the universal service support mechanisms so long as this cooperative relationship produces universal service support mechanisms that comply with the mandates of section 254 and we have adopted this approach with respect to the high cost and low-income support mechanisms.

819. There is no indication that Congress's authorization in section 254(f) of a separate support mechanism covering intrastate carriers evidences an intent that the amount of a carrier's contributions to the respective support mechanisms similarly should be based on the type of

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[2086] Majority State Members' Jurisdiction Report at 2.

[2087] 47 U.S.C. § 254(f); *see also* 47 U.S.C. § 254(b)(5).

[2088] *Compare* 47 U.S.C. § 254(b) ("The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles . . ."); § 254(c)(1) ("Universal service is an evolving level of telecommunications services that the Commission shall establish") *with* 47 U.S.C. § 254(f) ("A State may adopt regulations *not inconsistent* with the Commission's rules to preserve and advance universal service. . . . A State may adopt regulations to provide for *additional* definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt *additional* specific, predictable, and sufficient mechanisms to support such definitions or standards and *do not rely on or burden* Federal universal service support mechanisms") (emphasis added).

communications service, interstate or intrastate, provided by the carrier. Nothing in the legislative history supports such an inference. Indeed, the legislative history indicates that states may continue to have jurisdiction over implementing universal service mechanisms for intrastate services supplemental to the federal mechanisms so long as "the level of universal service provided by each state meets the minimum definition of universal service established [under section 254] and a State does not take any action inconsistent with the obligation for all telecommunications carriers to contribute to the preservation and advancement of universal service" established under section 254.[2089]

820. Several state PUCs assert that the Commission does not have jurisdiction over interstate and intrastate telecommunications revenues because such a scheme would potentially subject carriers' intrastate revenues to two support mechanisms, one federal and one state.[2090] The commenters argue that this double burden will hinder states' abilities to address state universal service issues. It is not clear to us how states would be hindered, because many of the carriers contributing to state and federal support mechanisms also would be eligible to receive both state and federal support. In any event, the statutory language envisions that both the federal and state support mechanisms will support basic intrastate and interstate services and, moreover, the statutory language plainly envisions that the state mechanisms will be in addition to the federal mechanisms.[2091]

821. Section 2(b) of the Communications Act is not implicated in this jurisdictional analysis. Section 2(b) provides that "nothing in [the Communications Act] shall be construed to apply or give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio."[2092] Even when the Commission exercises jurisdiction to assess contributions for universal service support from intrastate as well interstate revenues (i.e., for eligible schools and libraries and rural health care providers), such an approach does not constitute rate regulation of those services or regulation of those services so as to violate section 2(b). Instead, the Commission merely is supporting those services, as expressly required by Congress in section 254 and as recommended by the Joint Board. Indeed, as discussed above, Congress expressly mandated that the Commission ensure that such support mechanisms be sufficient. As recognized by several of the commenters, when assessing contributions based on intrastate and interstate revenues, the Commission merely is calculating a federal charge based on both interstate and intrastate revenues, which is distinct from regulating the rates and conditions of

[2089] Joint Explanatory Statement at 128.

[2090] *See e.g.,* Alabama PSC comments at 2-3; Kansas CC comments at 6; Kentucky PSC comments at 2-3.

[2091] 47 U.S.C. § 254(f).

[2092] 47 U.S.C. § 152(b).

interstate service.[2093]

822. Moreover, although the Commission is not adopting this approach, section 2(b) would not be implicated even if the Commission were to refer carriers to the states to obtain authorization to recover their intrastate contributions via intrastate rates, which it is not doing, because the Commission would still be referring the matter to the states' authority over changes in intrastate rates and the Commission itself would not be regulating those rates. In any event, to the extent that section 2(b) would be implicated in either of these approaches (assessment or recovery), section 254's express directive that universal service support mechanisms be "sufficient" ameliorates any section 2(b) concerns because, as a rule of construction section 2(b) only is implicated where the statutory provision is ambiguous.[2094] Here, as discussed above, section 254 is unambiguous in that the services to be supported have intrastate as well as interstate characteristics and in that the Commission is to promulgate regulations implementing federal support mechanisms covering the intrastate and interstate characteristics of the supported services. Therefore, the unambiguous language of section 254 overrides section 2(b)'s otherwise-applicable rule of construction.

823. Further, to the extent that commenters assert that the Communications Act generally divides the world into two spheres -- Commission jurisdiction over interstate carriers and interstate revenues and state jurisdiction over intrastate carriers and intrastate revenues -- section 254 blurs any perceived bright line between interstate and intrastate matters. The services that will be supported pursuant to this Order include both intrastate and interstate services. As discussed above, although section 254 anticipates a federal-state universal service partnership, section 254 grants the Commission primary responsibility for defining the parameters of universal service. Indeed, the recognition of this fact presumably led Congress to require Joint Board involvement in that Congress recognized that it was important for the Commission to consider the states' recommendations because the regulations ultimately adopted inevitably would affect the states' traditional universal service programs.[2095] The new requirements in the statute to consider the needs of schools, libraries, and health care providers in and of themselves require a fresh look at universal service. The legislative history also

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[2093] *See, e.g.*, Roseville Tel. Co. comments at 5; Vermont PSB comments at 5.

[2094] Section 601 also is consistent with our conclusion. Section 601 of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 601. We are not modifying any state law, but merely implementing a federal mandate and merely continuing the federal-state partnership that historically has provided for universal service. Section 261 also is consistent with our analysis because we are in no way preventing the states from continuing or implementing universal service mechanisms so long as those mechanisms are consistent with our mechanisms. 47 U.S.C. § 261.

[2095] It would be anomalous for Congress to have required such an active role for the states in a process concerned only with interstate matters.

indicates that the Commission, in consultation with the Joint Board, was not to be bound by mechanisms used currently. For example, the Joint Explanatory Statement warned against reliance on some current methodologies by stating that any support mechanisms should be "explicit, rather than implicit as many support mechanisms are today."[2096] Similarly, the Senate Report on S. 652 states that "the bill does not presume that any particular existing mechanism for universal service support must be maintained or discontinued."[2097] Therefore, we conclude that section 254 grants us the authority to assess contributions for the universal service support mechanisms from intrastate as well as interstate revenues and to refer carriers to seek state (and not federal) authorization to recover a portion of the contribution in intrastate rates. As described below, however, we see no need at this time to exercise the full extent of our jurisdiction.

b. Scope of the Revenue Base for the High Cost and Low-Income Support Mechanisms

824. We have determined that we will assess and permit recovery of contributions to the rural, insular, and high cost and low-income support mechanisms based only on interstate revenues. We will seek further guidance on this subject from the Joint Board because the Joint Board did not at the time of the Recommended Decision make a recommendation as to whether the revenue base for the high cost and low-income mechanisms should include intrastate as well as interstate revenues. We believe that our approach to assessment and recovery serves the public interest because it promotes comity between the federal and state governments and because it continues the traditional informal partnership between the federal government and the states in supporting universal service. Moreover, as described below, we believe that our approach for permitting recovery of carriers' contributions will help ensure the continued affordability of basic residential dialtone service. We fully anticipate that each of the states will join with us in ensuring the establishment of "specific, predictable, and sufficient" universal service support mechanisms.[2098]

825. Recovery of Carriers' Contributions to the High Cost and Low-Income Support Mechanisms. We have determined to continue our historical approach to recovery of universal service support mechanisms, that is, to permit carriers to recover contributions to universal service support mechanisms through rates for interstate services only. In discussing recovery we are referring to the process by which carriers' recoup the amount of their contributions to universal service. Although the Joint Board did not address this issue, as discussed below, the

[2096] Joint Explanatory Statement at 131. As previously noted, many of the implicit support mechanisms today are intrastate.

[2097] S. Rep. No. 23, 104th Cong., 1st Sess. 25 (1995).

[2098] 47 U.S.C. § 254(b)(5), (d).

Joint Board concluded that the "role of complementary state and federal universal service mechanisms require[d] further reflection" before the Joint Board could recommend that we assess contributions based on intrastate as well as interstate revenues.[2099] Therefore, we believe that our decision to provide for recovery based only on rates for interstate services is not inconsistent with the Joint Board Recommended Decision.

826. We believe that our approach to recovery promotes comity between the federal and state governments in that our approach will help us to develop a unified federal-state approach to universal service. As discussed above in section XIII.E.3.a, section 254 permits, but does not require, the Commission to assess contributions based only on interstate revenues (instead of on interstate and intrastate revenues). While the Joint Board further considers these jurisdictional issues, we deem it to be in the public interest to maintain the current relationship whereby the federal government oversees the assessments and recovery of the interstate share of the necessary contributions, and the state governments assess and provide recovery for the intrastate share of the necessary contributions. We also deem it in the public interest to maintain the traditional federal-state partnership because many states are in the process of altering their own universal service programs to comply with section 254 and we prefer to await the outcome of these reforms (which are expected later this year) before altering the federal-state relationship that thus far has provided for universal service for high cost areas and low-income consumers. Thus, we see no need for an immediate change in the manner in which these intrastate contributions are assessed and recovered.

827. Our decision as to the recovery of universal service contributions also is consistent with the statutory principle of providing affordable basic residential service in that by providing for recovery through interstate mechanisms we are avoiding a blanket increase in charges for basic residential dialtone service.[2100]

828. By providing for recovery of contributions to support universal service in rural, insular, and high cost areas and for low-income consumers solely from rates for interstate services, we also avoid any of the asserted difficulties raised by commenters such as NYNEX that oppose assessing contributions from interstate and intrastate revenues because some carriers may face difficulty recovering contributions based on intrastate revenues.[2101] Similarly, to the extent that some commenters were concerned that section 2(b) prevents us from providing for recovery via rates for intrastate services, there are no such problems -- perceived or otherwise -- with our decision to provide for recovery solely through rates for interstate services.

[2099] Recommended Decision, 12 FCC Rcd at 501.

[2100] 47 U.S.C. § 254(b)(1).

[2101] NYNEX comments at 25. *See also* Ohio PUC reply comments at 17-18.

829. Under our recovery mechanism, carriers will be permitted, but not required, to pass through their contributions to their interstate access and interexchange customers.[2102] We note that, if some carriers (e.g., IXCs) decide to recover their contribution costs from their customers, the carriers may not shift more than an equitable share of their contributions to any customer or group of customers.[2103] As discussed below in section XIII.F, we also have determined that the interstate contributions will constitute the substantial cause that would provide a public interest justification for filing federal tariff changes or making contract adjustments.

830. We have determined that ILECs subject to our price cap rules may treat their contributions for the new universal service support mechanisms as an exogenous cost change. We outline the precise contours of the exogenous change available to federal price cap carriers in our *Access Charge Reform Order*, adopted contemporaneously with this Order. For carriers not subject to federal price caps (e.g., other ILECs), we have determined to permit recovery of universal service contributions by applying a factor to increase their carrier common line charge revenue requirement. Of course, LECs and their affiliates that provide interLATA interstate services each will have their own universal service obligations and, therefore, the affiliates will be required to recover their own universal service contributions.[2104]

831. Assessment of the Revenue Base for the High Cost and Low-Income Support Mechanisms. In addition to the recovery mechanisms discussed above, we also consider whether we should assess contributions to the universal service support mechanisms based solely on interstate revenues or on both interstate and intrastate revenues. To promote comity between the federal and state governments, we have decided to follow our approach to the recovery issues and thus to assess contributions for the high cost and low income support mechanisms based solely on interstate revenues. We have every reason to believe that the states will continue to

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[2102] The details of the recovery mechanism for price cap LECs are explained in our companion *Access Charge Reform Order*, section VI.D.2.b.

[2103] In the *Local Competition Order*, the Commission stated that wholesale rates should be based on retail prices less avoided costs. *See Local Competition Order*, 11 FCC Rcd 15,954-15,957. We note that universal service contributions should be an additional avoided cost taken into account by states when setting the avoided cost discount rate. That is, avoided costs should include the contribution that an ILEC avoids from providing service to a reseller as opposed to an end user.

[2104] Section 272 of the 1996 Act provides that BOCs must provide in region interLATA services through a separate affiliate. 47 U.S.C. § 272(a). Previously, in the Competitive Carrier Fifth Report and Order, 98 FCC 2d 1191, 1198-99 n. 23 (1984), the Commission held that LECs must provide certain interstate services via affiliates or else be treated as a dominant carrier. The Commission recently reaffirmed this requirement. Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, CC Docket Nos. 96-149, 96-61, FCC 97-142 (rel. Apr. 18, 1997).

participate fully in this federal-state partnership and that the contributions collected by both jurisdictions will be sufficient. As discussed above, we conclude that our assessment approach also is warranted because the states presently are reforming their own universal service programs.

832. The approach we adopt today is consistent with the approach taken by the Joint Board. Specifically, the Joint Board concluded that the "decision as to whether intrastate revenues should be used to support the high cost and low income assistance programs should be coordinated with the establishment of the scope and magnitude of the proxy-based fund, as well as with state universal service support mechanisms."[2105] Although the Joint Board may have anticipated that these decisions all would be made in this Order, the crux of the Joint Board's analysis is that the question of interstate/intrastate contribution should be coordinated with the issues of appropriate forward-looking mechanisms and appropriate revenue benchmarks.[2106] Because those issues will be resolved in the future, we believe it would be premature for us to assess contributions on intrastate as well as interstate revenues. Our approach also is consistent with the recent recommendations contained in the Majority State Members' Jurisdiction Report. That report recommended that the Commission assess contributions for all support mechanisms from intrastate and interstate revenues, but supported the Commission's present approach to assess only interstate revenues for the high cost mechanisms until a forward-looking cost methodology is developed.[2107] Given that two state members of the Joint Board dissented from the recommendation that we assess both interstate and intrastate revenues, we believe that it is in the public interest to proceed to assess only interstate revenues while a unified federal-state approach is developed for the high cost and low-income support mechanisms.

833. Our assessment procedure is as follows. Between January 1, 1998 and January 1, 1999, contributions for the existing high cost support mechanisms and low-income support programs will be assessed against interstate end-user telecommunications revenues.[2108] Beginning on January 1, 1999, the Commission will modify universal service assessments to fund 25 percent of the difference between cost of service defined by the applicable forward-looking economic cost method less the national benchmark, through a percentage contribution on interstate end-user telecommunications revenues. We have decided to institute this approach to assessment on January 1, 1999 to coordinate it with the shift of universal service support for rural, insular, and high cost areas served by large LECs from the access charge regime to the

[2105] Recommended Decision, 12 FCC Rcd at 499.

[2106] Recommended Decision, 12 FCC Rcd at 501.

[2107] Majority State Members' Jurisdiction Report at 2.

[2108] *See infra* section XIII.F for a discussion of the end-user telecommunications revenues method of assessing contributions. Following January 1, 1998, the new funding mechanism for high cost and low-income programs will supersede the current funding mechanism for those programs.

section 254 universal service mechanisms.

834. Our decision to provide 25 percent of the necessary support for high cost providers is consistent with Congress's mandate that universal service support "should be explicit."[2109] As explained in the Joint Explanatory Statement, Congress intended that, to the extent possible, "any support mechanisms continued or created under new section 254 should be explicit, rather than implicit as many support mechanisms are today."[2110] Beginning on January 1, 1999, we will convert the existing implicit support to an explicit 25 percent support. We do not, however, attempt to identify existing state-determined intrastate implicit universal service support presently effected through intrastate rates or other intrastate rules, nor do we attempt to convert such implicit intrastate support into explicit federal universal service support. Indeed, as discussed above, we have decided to respect the states' historical role and expertise in providing the additional, necessary amount of support and we leave it to the states to convert their own programs into explicit support mechanisms. As states do so, we will be able to assess whether additional federal universal service support is necessary to ensure that quality services remain "available at just, reasonable and affordable rates."[2111] For our programs for low-income consumers, established under the jurisdiction of sections 1, 4(i), and 201-205, we adopt an approach consistent with our historical support for Lifeline/LinkUp programs and provide support for Lifeline/LinkUp from state and federal sources. Therefore, we provide $3.50 in federal support for every Lifeline consumer, which will be for ILECs a waiver of the SLC, plus an additional $1.75 pending state commission approval of a reduction in state rates. In addition, assuming state commission approval of state rate reductions, we will provide $1.00 of support for every $2.00 of support provided by the states, up to a maximum of $7.00 of federal support.

835. We are aware that some commenters are concerned that our assessment approach may have certain administrative problems in that carriers may have an incentive to classify revenues as intrastate rather than interstate to avoid collection. We also are aware that the Joint Board did not want service providers to make business decisions based on their obligations to contribute to federal support mechanisms.[2112] We share these concerns and we hope that the states will work with us to address them. Specifically, we hope to minimize any administrative problems by encouraging a federal-state partnership whereby together the Commission and the states will assess the entirety of the support mechanisms (25 percent from federal and 75 percent from state mechanisms). We are however aware of the need to monitor the administration of the support mechanisms and we will monitor the collection and distribution processes to ensure that they do not produce inequitable results. We expect that the states and the Joint Board will do the

[2109] 47 U.S.C. 254(e).

[2110] Joint Explanatory Statement at 131.

[2111] 47 U.S.C. 254(b)(1).

[2112] Recommended Decision, 12 FCC Rcd at 481-482.

same.

836. In response to COMSAT's comments, we clarify that carriers that provide interstate services must include all revenues derived from interstate and international telecommunications services. Thus, international telecommunications services billed to a domestic end user will be included in the contribution base of a carrier that provides interstate telecommunications services.[2113] Section 2(b) of the Act grants states the authority to regulate intrastate rates, but in contrast section 2(a) grants the Commission sole jurisdiction over interstate and foreign communications.[2114] Foreign communications are defined as a "communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside of the United States."[2115] We find that it would serve the public interest to require carriers providing interstate telecommunications services to base their contributions on revenues derived from their interstate and foreign or international telecommunications services. Contributors that provide international telecommunications services benefit from universal service because they must either terminate or originate telecommunications on the domestic PSTN. Therefore, we find that contributors that provide international telecommunications services should contribute to universal service on the basis of revenues derived from international communication services, although, as discussed above, revenues from communications between two international points would not be included in the revenue base.

c. Scope of the Revenue Base for the Support Mechanisms for Eligible Schools, Libraries, and Rural Health Care Providers

837. We adopt the Joint Board's recommendation that "universal support mechanisms for schools and libraries and rural health care providers be funded by contributions based on both the intrastate and interstate revenues of providers of interstate telecommunications services."[2116] We adopt this approach not only because the Joint Board recommended it, but also because the eligible schools, libraries, and rural health care mechanisms are new, unique support mechanisms that have not historically been supported through a universal service funding mechanism. Nonetheless, for now, we will provide for recovery of the entirety of these contributions via interstate mechanisms.

838. As with recovery of the amounts carriers contribute to the high cost and low-

[2113] Providers of interstate telecommunications required to contribute would include the revenues from international telecommunications billed to domestic end users.

[2114] 47 U.S.C. § 152(a) & (b).

[2115] 47 U.S.C. § 153(17).

[2116] Recommended Decision, 12 FCC Rcd at 499.

income support mechanisms, we have decided to permit recovery of contributions for the support mechanisms for eligible schools, libraries, and rural health care providers solely via rates for interstate services. Indeed, our rationale is even more compelling for the support mechanisms for eligible schools, libraries, and rural health care providers because those mechanisms will be supported based upon both intrastate and interstate revenues and, therefore, there is a heightened concern that carriers would recover the portion of their intrastate contributions attributable to intrastate services through increases in rates for basic residential dialtone service, contrary to the affordability principle contained in section 254(b)(1). Therefore, carriers may recover these contributions solely through rates for interstate services, in the same manner that they will recover their contributions to the high cost and low-income support mechanisms, as described above.

839. We find that our approach also minimizes any perceived jurisdictional difficulties under section 2(b) because we do not require carriers to seek state authorization to recover the contributions attributable to intrastate revenues. Nonetheless, carriers with interstate revenues far less than their intrastate revenues assert that they will be required to recover unfairly large contributions from their interstate customers and that this outcome is inequitable.[2117] These carriers misinterpret the statute's direction that contributions be "equitable and non-discriminatory."[2118] "Equitable" does not mean "equal."[2119] In the past, telecommunications subsidies have been raised by assessing greater amounts from services other than basic residential dialtone services. Competition in the telecommunications marketplace, however, should drive prices for services closer to cost and eliminate the viability of shifting costs from residential to business or from basic local service to long distance. Congress did direct that contributions be non-discriminatory. This we accomplish by making the formula for calculating contributions the same for all competitors competing in the same market segment. Although a provider of business services may pay a greater contribution than a provider of residential service, the provider of business services pays contribution according to the same formula as other providers of business services. Similarly, simply because a provider has far more interstate than intrastate revenue does not make a formula based on interstate revenue discriminatory, provided the formula is the same for other providers of similar interstate services.

840. As to the assessment of contributions for the support mechanisms for eligible schools, libraries, and rural health care providers, the Commission is adopting the Joint Board's recommendation that these contributions be based upon both interstate and intrastate

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[2117] Sprint comments at 7-9.

[2118] 47 U.S.C. § 254(b)(4).

[2119] Courts have recognized the "importance of treating parties alike when they participate in the same event or when the agency vacillates *without reason* in its application of a statute or the implementing regulations." *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987) (emphasis added); *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

revenues.[2120] We have selected this approach because these are new and unique federal programs and states have not supported these initiatives to the same extent that they have supported other universal service support mechanisms. In contrast to the high cost mechanisms, many states do not already have programs in place that would guarantee sufficient support mechanisms for eligible schools, libraries, and rural health care providers. Therefore, we are not as confident that a federal-state partnership would sufficiently support these new and unique support mechanisms, particularly in the early years of the program. Because section 254 obligates the Commission to ensure the sufficiency of this support program, we deem it necessary to adopt an approach that will guarantee that this statutory mandate is satisfied. In addition, assessing both intrastate and interstate revenues to fund the support mechanisms for eligible schools, libraries, and rural health care providers is more feasible than for the other mechanisms because the amount of the new support mechanisms will be smaller than the other mechanisms (i.e., the combined amounts of the federal and state high cost and low-income support mechanisms will be greater than the total amount of the schools, libraries, and rural health care mechanisms). Therefore, we believe that it is appropriate for us to assess a contributor based upon its intrastate and interstate revenues for the schools, libraries, and rural health care support mechanisms.

841. For the same reasons described above, we conclude that carriers that provide interstate services must include all revenues derived from interstate and international telecommunications services. Contributors that provide international telecommunications services benefit from universal service because they must either terminate or originate telecommunications on the domestic PSTN. Therefore, we find that contributors that provide international telecommunications services should contribute to universal service on the basis of revenues derived from those services.

F. Basis for Assessing Contributions

1. Background

842. Section 254(d) states that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to

[2120] Our approach also is consistent with the recent Majority State Members' Jurisdiction Report, which reiterated the Joint Board's recommendation that the Commission should assess contributions for the support mechanisms for eligible schools, libraries, and rural health care providers from interstate and intrastate revenues. Majority State Members' Jurisdiction Report at 2. Although two state members of the Joint Board dissented from this recommendation, *see* McClure/Schoenfelder Dissent, in contrast to the high cost and low-income support mechanisms where we are attempting to develop a unified approach, we conclude that notwithstanding this dissent it is important for the Commission to assess both interstate and intrastate revenues for the other support mechanisms because there are not in place sufficient state mechanisms to ensure that section 254's mandates are satisfied.

preserve and advance universal service."[2121] In the NPRM, the Commission suggested three different bases for calculating contributions to the universal service mechanisms established by the Commission: gross revenues; gross revenues net of payments to other carriers for telecommunications services (net telecommunications revenues); and per-line or per-minute charges.[2122] The Commission invited comment on the relative merits of these methods and the extent to which they satisfy the requirements of the Act.[2123] The Commission also sought comment on any other alternative methodologies for calculating a carrier's or service provider's contribution to universal service support. The Commission instructed commenters to address which method would be the most easily administered and competitively neutral, taking into account the possibility that the Commission could require non-carrier providers of telecommunications services to contribute.[2124] The Joint Board recommended that contributions be based on gross revenues derived from telecommunications services net of payments to other carriers for telecommunications services because that method would eliminate the double payment problem,[2125] would assess contributions on a value-added basis, and is familiar to the Commission and the industry.[2126]

2. Discussion

843. We agree with the Joint Board's recommendation that we must assess contributions in a manner that eliminates the double payment problem, is competitively neutral and is easy to administer.[2127] To address the Joint Board's concerns, we find that contributions should be based on end-user telecommunications revenues. Based on new information in the record, we find that this basis for assessing contributions represents a basis for our universal service support mechanisms more administratively efficient than the net telecommunications revenues method recommended by the Joint Board while still advancing the goals embraced by the Joint Board. We note that we will assess contributions, i.e., raise sufficient funds to cover universal service's funding needs, only after we have determined the total size of the support mechanisms.

[2121] 47 U.S.C. § 254(d). *See also* 47 U.S.C. § 254(b)(4).

[2122] NPRM at paras. 122-125.

[2123] NPRM at para. 125.

[2124] NPRM at paras. 122-126.

[2125] *See* section XIII.F.2, *infra* for a description of the double payment problem.

[2126] Recommended Decision, 12 FCC Rcd at 495.

[2127] Recommended Decision, 12 FCC Rcd at 495.

844. We will assess contributions based on telecommunications revenues derived from end users for several reasons, including administrative ease and competitive neutrality. The net telecommunications revenues and end-user telecommunications revenues methods are relatively equivalent because they assess contributions based on substantially similar pools of revenues.[2128] Therefore, we conclude that contributions will be based on revenues derived from end users for telecommunications and telecommunications services, or "retail revenues." Unlike retail revenues, however, end-user telecommunications revenues include revenues derived from SLCs. End-user revenues would also include revenues derived from other carriers when such carriers utilize telecommunications services for their own internal uses because such carriers would be end users for those services. This methodology is both competitively neutral and relatively easy to administer.

845. Basing contributions on end-user revenues, rather than gross revenues, is competitively neutral because it eliminates the problem of counting revenues derived from the same services twice. The double counting of revenues distorts competition because it disadvantages resellers. For example, assuming a 10 percent contribution rate on gross revenues, if facilities-based carrier X sells $200.00 worth of telecommunications services directly to a customer, its contribution will be $20.00. If reseller B buys $180.00 worth of wholesale services from carrier A and B sells the same retail services in competition with X after adding $20.00 of value, B would owe a contribution of $20.00 on these $200 worth of services, but B would also be required to recover the portion of the $18.00 contribution that A must make and would likely pass on to B. Therefore, while X would face $200.00 in service costs and $20.00 in support costs, B would face $200.00 in service costs and almost certainly substantially more than $20.00 in support costs. Adding another reseller to the A-B chain would compound this problem.

846. Assuming carriers will pass on some portion of the cost of contribution to their customers, the reseller, like B in the above example, that sells to end users will be disadvantaged vis-a-vis non-resellers of the same retail service, like X, because of this double-counting problem. We seek to avoid a contribution assessment methodology that distorts how carriers choose to structure their businesses or the types of services that they provide. Basing contributions on end-user revenues eliminates the double-counting problem and the market distortions assessments based on gross revenues create because transactions are only counted once at the end-user level. Although it will relieve wholesale carriers from contributing directly to the support mechanisms, the end-user method does not exclude wholesale revenues from the contribution base of carriers that sell to end users because wholesale charges are built into retail rates.

847. Consequently, we agree with the Joint Board's finding that basing contributions on gross telecommunications revenues creates a double-payment problem for resold services and

[2128] *See* Sprint comments at 9-10.

thus is not competitively neutral, as discussed above. Therefore, like the Joint Board, we reject basing contributions on gross telecommunications revenues because that method is not consistent with the Joint Board's principle of competitive neutrality.

848. Calculating assessments based upon end-user telecommunications revenues also will be administratively easy to implement. Like the net telecommunications revenues approach, the end-user telecommunications revenues approach will require carriers to track their sales to end users; carriers, however, must already track their sales for billing purposes. Although the end-user telecommunications revenues method will require carriers to distinguish sales to end users from sales to resellers, we do not foresee that this will be difficult because resellers will have an incentive to notify wholesalers that they are purchasing services for resale in order to get a lower price that does not reflect universal service contribution requirements. Although the end-user telecommunications revenues approach requires that a distinction be made between retail and wholesale revenues, using end-user telecommunications revenues will still be easier to administer and less burdensome than the net telecommunications revenues approach because it will not require wholesale carriers to submit annual or monthly contributions directly to the administrator, as they would under the net telecommunications revenues approach. If wholesale carriers were required to make direct contributions based on their net telecommunications revenues, we would anticipate that they would try to pass that cost on to their carrier customers that provide retail services. Finally, although the Commission does not currently collect data regarding end-user telecommunications revenues, we are confident of our ability to develop a database of such information relatively quickly. In addition, we find that the Commission will be able to identify inaccurate end-user-revenue filings based on revenue information in our existing databases.

849. Another reason we adopt an end-user telecommunications revenues method of assessing contributions rather than a net telecommunications revenues method is that, although the two methods are theoretically equivalent, the former method eliminates some economic distortions associated with the latter method that can occur in practice. As an initial matter, we observe that, contrary to some commenters' assertions, both methods are competitively neutral because they both eliminate double-counting of revenues and assess the same total amount of contributions. This is illustrated best with an example. Assume an IXC earned $100.00 in long distance revenues and paid $40.00 to a LEC in access charges. Assuming a hypothetical 10 percent contribution rate, under the end-user telecommunications revenues method, the IXC would be required to contribute $10.00 and the LEC would contribute nothing because it has no end-user telecommunications revenues. Under the net telecommunications revenues approach, the LEC would be required to contribute $4.00, and the IXC $6.00. Thus, under either method, the Commission would collect $10.00 in universal service contributions.

850. Although the two assessment methods are theoretically equivalent, we conclude that, in practice, the net telecommunications revenues approach is likely to cause distortions that could be avoided by using the end-user telecommunications revenues approach. For example,

the theoretical equivalence of the two methods assumes that all carriers will be able to recover fully their contributions from their customers. Some carriers, however, particularly those with long-term contracts, may be unable to recover fully those costs. If contributions are assessed on the basis of net telecommunications revenues and some intermediate carriers cannot incorporate their contributions into their prices, uneconomic substitution could result because other carriers would have an incentive to purchase services from those intermediate carriers, rather than to provide those services with their own facilities, to reduce their direct contribution to universal service. Basing contributions on end-user telecommunications revenues eliminates this potential economic distortion because contributions will be assessed at the end-user level, not at the wholesale and end-user level. Contributors will not have more of an incentive to build their own facilities or purchase services for resale in order to reduce their contribution because, regardless of how the services are provided, their contributions will be assessed only on revenues derived from end users.

851. In response to PacTel's request that the Commission clarify the Joint Board's discussion of universal service contributions and unbundled network elements,[2129] we state that ILECs are prohibited from incorporating universal service support into rates for unbundled network elements because universal service contributions are not part of the forward-looking costs of providing unbundled network elements.[2130] Although we do not mandate that carriers recover contributions in a particular manner, we note that carriers are permitted to pass through their contribution requirements to all of their customers of interstate services in an equitable and nondiscriminatory fashion.[2131] Furthermore, we find that universal service contributions constitute a sufficient public interest rationale to justify contract adjustments.[2132] Section 254 gives the Commission authority to require new contributions to the universal service support mechanisms from telecommunications carriers that provide interstate telecommunications services and other providers of interstate telecommunications. As discussed above, contributions will be assessed against revenues derived from end users for telecommunications or telecommunications services. Some of those revenues will be derived from private contractual agreements. By assessing a new contribution requirement, we create an expense or cost of doing business that was not anticipated at the time contracts were signed. Thus, we find that it would serve the public interest to allow telecommunications carriers and providers to make changes to existing contracts for service in order to adjust for this new cost of doing business. We clarify,

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[2129] PacTel comments at 26-27.

[2130] *See also Local Competition Order*, 11 FCC Rcd at 15860-15861. We note that the pricing provisions of the *Local Competition Order* are subject to a partial stay. *See supra* note 7.

[2131] For further discussion of recovery issues, *see infra* section XIII.E.

[2132] *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (finding that gas companies cannot change contract prices at will but the Federal Power Commission can authorize rate increases if it finds contract rates to conflict with the public interest).

however, that this finding is not intended to pre-empt state contract laws.

852. We do not adopt commenters' suggestions that contributions be calculated entirely on non-revenues-based measures, such as a per-minute or per-line basis at this time.[2133] We affirm the Joint Board's recommendation that such mechanisms would require the Commission to adopt and administer difficult "equivalency ratios" for calculating the contributions of carriers that do not offer services on a per-line or per-minute basis.[2134] As competition changes the telecommunications marketplace, carriers may increasingly offer bundled services for flat-rate monthly charges. It would be administratively difficult to calculate an equivalent per-minute contribution for carriers that do not charge customers on a per-minute basis. In addition, we find that these approaches are not competitively neutral because they may inadvertently favor certain services or providers over others if the "equivalency ratios" are improperly calculated or inaccurate.

853. Furthermore, we agree with the Joint Board and reject commenters' suggestions that the Commission mandate that carriers recover contributions through an end-user surcharge.[2135] The state Joint Board members also assert that state commissions "should have the discretion to determine if the imposition of an end-user surcharge would render local rates unaffordable."[2136] A federally prescribed end-user surcharge would dictate how carriers recover their contribution obligations and would violate Congress's mandate and the wish of the state members of the Joint Board.[2137] The state Joint Board members add that it would be "premature" to judge how carriers in the telecommunications market would choose to recover

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[2133] *See, e.g.*, APC comments at 9; Aerial comments at 2-3 (basing on per-line or number of dialable numbers is easily quantifiable and understood); Broadband PCS Alliance comments at 2-3 (arguing in favor of a charge based on number of lines); Sprint PCS comments at 10-11 (arguing in favor of a charge based on the number of subscribers served); AirTouch reply comments at 15-16 (arguing in favor of a charge based on each access line).

[2134] *See* Recommended Decision, 12 FCC Rcd at 496.

[2135] *See, e.g.*, ALLTEL comments at 8; Ameritech comments at 31; AT&T comments at 8; BellSouth comments at 15-16; California Department of Consumer Affairs comments at 38-40; GTE comments at 36; LCI comments at 14; MFS comments at 112-13; NYNEX comments at 23-24; PacTel comments at 20-23; PageNet comments at 16; RTC comments at 35-36; SBC comments at 11-14; TDS comments at 6-8; U S West comments at 45-46; USTA comments at 22; WorldCom comments at 40-41; ACTA reply comments at 6; AirTouch reply comments at 20-21; ALTS reply comments at 5-8; BANX joint reply comments at 2-3; California SBA reply comments at 4-5; KMC reply comments at 4; SBC reply comments at 2-3.

[2136] State Members of the Federal-State Joint Board on Universal Service Comments on Recovery Mechanism for Universal Service Contributions, dated April 8, 1997, at 1 (*State Contributions Comments*).

[2137] *State Contribution Comments* at 1.

their contributions during the transition to competitive markets.[2138] We agree with the state members and CPI that we should allow carriers the flexibility to decide how they should recover their contribution.[2139] As telecommunications carriers and providers begin merging telecommunications products into single offerings, for example package prices for local and long distance service, we anticipate that they will offer bundled services and new pricing options. Mandating recovery through an end-user surcharge would eliminate carriers' pricing flexibility to the detriment of consumers.

854. In summary, we find the end-user telecommunications revenues approach to be more consistent with our principle of competitive neutrality than the gross revenues approach and easier to administer than the net telecommunications revenues approach. In addition, we agree with the state Joint Board members that an end-user surcharge is not necessary to ensure that contributions be explicit.[2140] We find that basing contributions on end-user telecommunications revenues satisfies the statutory requirement that support be explicit because carriers will know exactly how much they are contributing to the support mechanisms. Carriers will calculate their contributions by multiplying their end-user revenues by the universal service contribution percentage announced by the Commission or administrator, so there will be no ambiguity regarding the cost associated with the preservation and advancement of universal service.

855. To the extent that carriers seek to pass all or part of their contributions on to their customers in customer bills, we wish to ensure that carriers include complete and truthful information regarding the contribution amount. We do not assume that contributors will provide false or misleading statements, but we are concerned that consumers receive complete information regarding the nature of the universal service contribution.[2141] Unlike the SLC,[2142] the universal service contribution is not a federally mandated direct end-user surcharge. We believe that it would be misleading for a carrier to characterize its contribution as a surcharge. Specifically, we believe that characterizing the mechanism as a surcharge would be misleading

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[2138] *State Contributions Comments* at 1.

[2139] CPI reply comments at 15-17.

[2140] *State Contributions Comments* at 2.

[2141] *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). *See also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, __ U.S. __, 105 S. Ct. 2265, 2281 (1985) (State may seek to prevent potential deception by requiring attorneys to disclose in their advertising certain factual information regarding fee arrangements); *see generally 44 Liquormart, Inc. v. Rhode Island*, __ U.S. __, 116 S. Ct. 1495, 1505 (1996).

[2142] *See* MTS and WATS Market Structure, *Third Report and Order*, 93 FCC 2d 241, *modified on recon.*, *Memorandum Opinion and Order*, 97 FCC 2d 682 (1983).

because carriers retain the flexibility to structure their recovery of the costs of universal service in many ways, including creating new pricing plans subject to monthly fees. As competition intensifies in the markets for local and interexchange services in the wake of the 1996 Act, it will likely lessen the ability of carriers and other providers of telecommunications to pass through to customers some or all of the former's contribution to the universal service mechanisms. If contributors, however, choose to pass through part of their contributions and to specify that fact on customers' bills, contributors must be careful to convey information in a manner that does not mislead by omitting important information that indicates that the contributor has chosen to pass through the contribution or part of the contribution to its customers and that accurately describes the nature of the charge.

856. In addition, we agree with the Joint Board and TCA, which recommend that, if carriers provide services eligible for support from universal service support mechanisms at a discount or below cost, carriers may receive credits against their contributions.[2143] Contributions to the support mechanisms may be made in cash. In addition, carriers that provide services to eligible schools, libraries, or rural health care providers may offset their required contribution by an amount equal to the difference between the pre-discount price for service and the amount charged to the eligible institution. Allowing or requiring an offset will not prevent carriers from recovering the full, pre-offset contribution due on its revenues in the manner in which the carrier chooses.

857. Finally, we agree with SNET that carriers should not include support mechanisms payments when calculating their contributions.[2144] We find that payments received from the universal service support mechanisms do not qualify as revenues derived from end users for telecommunications revenues and should not be included in the assessment base. Finally, in response to Excel's comments that resellers should receive credits against their universal service contributions for the provision of supported services,[2145] we note that "pure" resellers may not be designated as "eligible carriers" under section 214(e) and may not receive universal service support payments.[2146] Carriers selling supported services to resellers, however, may be eligible to receive universal service support. In addition, carriers that offer supported services through the use of unbundled network elements, in whole or in part, may be eligible to receive universal service support.

G. Administrator of the Support Mechanisms

[2143] TCA comments at 9.

[2144] SNET comments at 4.

[2145] Excel comments at 15-16.

[2146] 47 U.S.C. § 214(e). *See supra* section XI.B.2.b.

1. Background

858. In the NPRM, the Commission sought comment on the best way to assure that administration of the universal service support mechanisms is fair, consistent, and efficient. The Commission suggested that the support mechanisms could be administered by a non-governmental entity and stated that any administrator should be required to operate in an efficient, fair, and competitively neutral manner. Furthermore, the Commission explained that the administrator would be required to process information and databases on a large scale, to calculate the correct amount of each carrier's contribution and to apply eligibility criteria consistently so that only carriers eligible for support are drawing funds from the support mechanism. The Commission asked commenters to discuss these criteria and any others the Commission might use to assess qualifications of any candidates, for how long an administrator should serve, and any other matters related to the selection and appointment of an administrator. The Commission also invited parties to suggest the most efficient and least costly methods to accomplish the administrative tasks associated with administration.[2147]

859. The Commission additionally sought comment on whether universal service support could be collected and distributed by state PUCs. This approach would make individual state commissions or groups of state commissions responsible for administering the collection and distribution of funds, operating under plans approved by the Commission. The NPRM suggested that state PUCs might delegate the administration of funds to a governing board composed of representatives from the state commissions, the contributing carriers, and support recipients. This board could also function as a central clearinghouse to the extent collection and distribution issues extended beyond the boundaries of individual states. The Commission requested comment on this alternative approach and on what provisions should be incorporated in any plan that the Commission approves for administration under this option. The Commission also invited proposals for other ways to administer the support mechanisms.[2148] Pursuant to the Act's principle that support for universal service should be "predictable,"[2149] the Commission also sought comment estimating the cost of administration using either of the two approaches that it proposed. Commenters proposing an alternative method were asked to identify the costs of administration associated with their proposals.[2150]

860. The Joint Board recommended that the Commission, pursuant to the Federal

[2147] NPRM at paras. 128-129.

[2148] NPRM at para. 130.

[2149] 47 U.S.C. § 254(b)(5).

[2150] NPRM at para. 131.

Advisory Committee Act (FACA),[2151] create a universal service advisory board to select and oversee a neutral, third-party administrator of the support mechanism.[2152] The Joint Board recommended that NECA not be automatically appointed the permanent administrator because it found NECA's membership, Board of Directors, and advocacy in Commission proceedings projected the appearance of bias towards ILECs. It also recommended, however, that the Commission take any necessary actions to allow NECA to render itself a neutral, third party.[2153] Finally, the Joint Board recommended that NECA be appointed the temporary administrator of the support mechanisms after its governance was made more representative of non-ILEC interests.

2. Discussion

861. Based on the Joint Board's recommendation and the record in this proceeding, we will create a Federal Advisory Committee (Committee), pursuant to the FACA,[2154] whose sole responsibility will be to recommend to the Commission through a competitive process a neutral, third-party administrator to administer the support mechanisms. Given the potential difficulties of coordinating all aspects of the support mechanisms, we adopt the Joint Board's recommendation and conclude that administration by a central administrator would be most efficient and would ensure uniform application of the rules governing the collection and distribution of funding for universal service support mechanisms nationwide. We also adopt the Joint Board's recommendation that NECA be appointed the temporary administrator of the support mechanisms.[2155]

862. Like the Joint Board, we believe that broad participation by representatives of contributors, support recipients, state PUCs, and other interested parties in the administrator selection process, as required by the FACA, will eliminate concerns that the chosen administrator will not be neutral. A Federal Advisory Committee may be established only after consultation with the Office of Management and Budget and the General Services Administration and the filing of a charter with Congress.[2156] The Commission has initiated this process and will solicit nominations to the Committee as soon as possible.

[2151] 5 U.S.C., App. § 4(a) and 3(2)(C).

[2152] Recommended Decision, 12 FCC Rcd at 505.

[2153] Recommended Decision, 12 FCC Rcd at 506.

[2154] 5 U.S.C., App. §§ 4(a) and 3(2)(C).

[2155] Recommended Decision, 12 FCC Rcd at 506.

[2156] 5 U.S.C., App. §§ 4(a) and 3(2)(C).

863. We agree with the Joint Board's recommendation and adopt their four proposed requirements. As a result, the administrator must: (1) be neutral and impartial; (2) not advocate specific positions to the Commission in proceedings not related to the administration of the universal service support mechanisms; (3) not be aligned or associated with any particular industry segment; and (4) not have a direct financial interest in the support mechanisms established by the Commission.[2157]

864. We clarify the Joint Board's criteria as follows. First, the administrator must not advocate positions before the Commission in non-universal service administration proceedings related to common carrier issues, although membership in a trade association that advocates positions before the Commission will not render an entity ineligible to serve as the administrator. Second, the administrator may not be an affiliate of any provider of "telecommunications services."[2158] An "affiliate" is a "person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person."[2159] A person shall be deemed to control another if such person possesses, directly or indirectly, (1) an equity interest by stock, partnership (general or limited) interest, joint venture participation, or member interest in the other person equal to ten (10%) percent or more of the total outstanding equity interests in the other person, or (2) the power to vote ten (10%) percent or more of the securities (by stock, partnership (general or limited) interest, joint venture participation, or member interest) having ordinary voting power for the election of directors, general partner, or management of such other person, or (3) the power to direct or cause the direction of the management and policies of such other person, whether through the ownership of or right to vote, voting rights attributable to the stock, partnership (general or limited) interest, joint venture participation, or member interest) of such other person, by contract (including but not limited to stockholder agreement, partnership ((general or limited)) agreement, joint venture agreement, or operating agreement), or otherwise.[2160] Third, the administrator and any affiliate thereof may not issue a majority[2161] of its debt[2162] to, nor may it derive a majority of its revenues from any provider(s) of telecommunications services. Fourth, if the administrator has a Board of Directors that contains members with direct financial interests in entities that contribute to or benefit from the support mechanisms, no more than a third of the Board members may represent

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[2157] Recommended Decision, 12 FCC Rcd at 505.

[2158] 47 U.S.C. § 153(46).

[2159] 47 U.S.C. § 153(1).

[2160] *See* North American Numbering Council, *North American Numbering Plan Administration Requirements Document* (rel. Feb. 20, 1997).

[2161] A "majority" shall mean greater than 50 percent.

[2162] "Debt" shall mean bonds, securities, notes, loans or any other instrument of indebtedness.

interests from any one segment of contributing carriers or support recipients, and the Board's composition must reflect the broad base of contributors to and recipients of universal service support. An individual does not have a direct financial interest in the support mechanisms if he or she is not an employee of a telecommunications carrier, provider of telecommunications, or a recipient of support mechanisms funds, does not own equity interests in bonds or equity instruments issued by any telecommunications carrier, and does not own mutual funds that specialize in the telecommunications industry. We also create a *de minimis* exemption from this rule. We will define an individual's ownership interest in the telecommunications industry as *de minimis* if in aggregate the individual, spouse, and minor children's impermissible interests do not exceed $5,000.00.[2163]

865. The size of the support mechanisms and the broad base of contributors and support recipients make a neutral administrator essential to the equitable and nondiscriminatory administration of the support mechanisms. To ensure the administrator's neutrality and appearance of neutrality, we conclude that we must require that no one in a position of influence within the administrator's organization have a direct financial interest in the support mechanisms, subject to the Board of Directors' standard above. As several commenters to the Recommended Decision note, any candidate must also have the ability to process large amounts of data efficiently and quickly and to bill large numbers of carriers.[2164] The administrator's costs will be added to the support mechanisms and will be funded by the contributing carriers.

866. Even though NECA has administered the existing high cost assistance fund and the TRS fund, many commenters question NECA's ability to act as a neutral arbitrator among contributing carriers because NECA's membership is restricted to ILECs, its Board of Directors is composed primarily of representatives of ILECs, and it has taken advocacy positions in several Commission proceedings.[2165] Given that the appearance of impartiality for the new administrator is essential, and considering the importance and magnitude of the universal service support programs, we agree with the Joint Board and find that NECA would not be qualified to be the permanent administrator.[2166] If, however, changes to its Board of Directors or its corporate structure render it able to satisfy the neutrality criteria discussed above, NECA would be permitted to participate in the permanent administrator selection process. Finally, in the interest of speedy implementation of the support mechanisms, we adopt the Joint Board's

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[2163] *See* 5 C.F.R. § 2640.202. This Office of Government Ethics rule defines a *de minimis* security interest as an amount not exceeding $5,000.00.

[2164] Recommended Decision, 12 FCC Rcd at 503. *See* Illinois CC NPRM comments at 10-11; NCTA NPRM comments at 25.

[2165] *See* Recommended Decision, 12 FCC Rcd at 506. *See also* ALTS comments at 18-19; Sprint comments at 10-11; Telco comments at 13; Ameritech reply comments at 7.

[2166] Recommended Decision, 12 FCC Rcd at 506.

recommendation that NECA be appointed the temporary administrator of the support mechanisms, subject to changes in NECA's governance that render it more representative of non-ILEC interests.[2167] We note that the temporary administrator may not spend universal service support mechanisms' funds until it is appointed by the Commission.

H. Implementation

867. Because implementation of the new universal service support mechanisms is extremely important to the nation, we require in this Order that the Committee recommend a neutral, third-party administrator through a competitive process no later than six months after the Committee's first meeting. Within the six-month period, the Committee must create a document describing what the administrator of the support mechanisms will be required to do and the criteria by which candidates will be evaluated, solicit applications from qualifying entities, and recommend the most qualified candidate. We intend to act upon the Committee's recommendation within six months. The administrator will be appointed for a five-year term, beginning on the date that the Commission selects it as the administrator. We also require the chosen administrator to be prepared to administer all facets of the universal service support mechanisms within six months of its appointment. The Commission will review the administrator's performance to ensure that it is fulfilling its responsibilities in an acceptable and impartial manner two years after its appointment. At any time prior to the end of the administrator's five-year term, the Commission may re-appoint the administrator for up to another five years. Otherwise, the Commission will create another Federal Advisory Committee to recommend another neutral, third-party administrator.

868. The Commission will direct the chosen administrator to report annually to the Commission an itemization of monthly administrative costs that shall consist of all expenses, receipts, and payments associated with the administration of the universal service support mechanisms. The administrator shall file a cost allocation manual (CAM)[2168] with the Commission, and shall provide the Commission full access to all data collected pursuant to the administration of the universal service support mechanisms. We further require that the administrator shall be subject to a yearly audit by an independent accounting firm and an additional yearly audit by the Commission, if the Commission so requests. The administrator is further required to keep the universal service support mechanisms separate from all other funds under the control of the administrator.

[2167] We note that the Commission has initiated a rulemaking regarding making changes to NECA's governance. *See* Changes to the Board of Directors of the National Exchange Carrier Association, Inc., *Notice of Proposed Rulemaking and Notice of Inquiry*, CC Docket No. 97-21, FCC 97-2 (rel. Jan. 10, 1997).

[2168] This manual will describe the accounts and procedures the administrator will use to segregate and allocate the costs of administering the support mechanisms from its other operations.

869. The administrator is directed to maintain and report to the Commission detailed records relating to the determination and amounts of payments made and monies received in the universal service support mechanisms. Information based on these reports should be made public at least once a year as part of a Monitoring Report. Because the current Monitoring Program in CC Docket No. 87-339, which monitors the current Universal Service Fund, will end with the May 1997 report[2169] and because NARUC has petitioned the Commission to continue this Monitoring Program,[2170] we delegate to the Common Carrier Bureau, in consultation with the state staffs of the Joint Boards in CC Docket No. 96-45 and CC Docket No. 80-286, the creation of a new monitoring program to serve as a vehicle for these Monitoring Reports. We also delegate to the Bureau the details of the exact content and timing of release of these reports.

[2169] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Establishment of a Program to Monitor the Impact of Joint Board Decisions, *Order*, 7 FCC Rcd 4285-4288, 4541.

[2170] NARUC, Resolution No. 4, February 26, 1997.